

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(Filed: August 31, 2007)

DO NOT PUBLISH

LEE ANN KAY,)	
as parent of her son,)	
MASON KAY,)	
)	
Petitioner,)	
)	
v.)	No. 05-0393V
)	Attorneys' Fees; Attorneys' Costs;
SECRETARY OF)	Personal Expenses
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

DECISION ON ATTORNEYS' FEES, ATTORNEYS' COSTS
AND PERSONAL EXPENSES¹

Petitioner, Lee Ann Kay (Ms. Kay), as parent of her son, Mason Kay (Mason), seeks an award of \$24,188.71 in attorneys' fees, attorneys' costs and personal expenses as defined by General Order No. 9 for an action that she pursued under the National Vaccine Injury Compensation Program (Program).² See Petitioner's Application for Fees and Costs (Fee Petition), filed August 9, 2007. Ms. Kay did not receive Program compensation. Indeed, on March 26, 2007, the special master ruled that the statute of limitations contained in § 300aa-16(a)(2) bars Ms. Kay's Program petition. See *Kay v. Secretary of HHS*, No. 05-0393V, Decision (Fed. Cl. Spec. Mstr. Mar. 26, 2007). Ms.

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

Kay did not seek review of the special master's decision. Therefore, on May 4, 2007, the clerk of court entered judgment dismissing the petition. See *Kay v. Secretary of HHS*, No. 05-0393V, Judgment (Fed. Cl. May 4, 2007).

Respondent objects to Ms. Kay's Fee Petition. See generally Respondent's Opposition to Petitioner's Application for Attorney's Fees and Costs (Response), filed August 16, 2007. Citing *Brice v. Secretary of HHS*, 358 F.3d 865 (Fed. Cir. 2004), and *Martin v. Secretary of HHS*, 62 F.3d 1403 (Fed. Cir. 1995), respondent contends that the special master "lacks jurisdiction to award attorneys' fees and costs." Response at 1, 5. Thus, respondent insists, the special master "must" deny Ms. Kay's Fee Petition. Response at 1.

Ms. Kay did not reply to respondent's Response. See Vaccine Rule 8(f) ("Any fact or argument not raised specifically in the record before the special master shall be considered waived and cannot be raised by either party in proceedings on review of a special master's decision.")

Brice stands certainly for the proposition that a special master may not exercise discretion under § 300aa-15(e)(1) to award attorney's fees, attorney's costs and personal expenses to an unsuccessful petitioner when the unsuccessful petitioner filed a Program petition beyond the statute of limitations contained in § 300aa-16(a)(2). *Brice*—and *Martin*—represent precedent of the United States Court of Appeals for the Federal Circuit (Federal Circuit). The special master and the United States Court of Federal Claims "may not deviate from" Federal Circuit precedent, *Crowley v. U.S.*, 398 F.3d 1329, 1335 (Fed. Cir. 2005), unless "the circuit's precedent is expressly overruled by statute or by a subsequent Supreme Court decision." *Strickland v. Secretary of HHS*, 423 F.3d 1335, 1338, n. 3 (Fed. Cir. 2005), citing *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1372 (Fed. Cir. 2000). Congress has not abrogated *Brice* by amending the statute establishing the Program. The United States Supreme Court has not overruled *Brice*. In fact, the United States Supreme Court denied a petition for writ of certiorari in *Brice*. *Bryce v. Secretary of HHS*, 534 U.S. 1040 (2001). As a consequence, *Brice* compels the special master to deny Ms. Kay's Fee Petition.

In the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment denying the Fee Petition.

s/John F. Edwards
John F. Edwards
Special Master